

FILED BY CLERK

MAY 28 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2010-0009-PR
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
GILBERT ARVIZO RAMOS,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051699

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Barton & Storts, P.C.  
By Brick P. Storts, III

Tucson  
Attorneys for Petitioner

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B R A M M E R, Judge.

¶1 Gilbert Arvizo Ramos petitions this court for review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R.

Crim. P. We will not disturb a trial court’s ruling on a petition for post-conviction relief unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant the petition for review but deny relief for the reasons stated below.

¶2 Ramos was convicted after a jury trial of possession of a deadly weapon by a prohibited possessor. He was sentenced to a presumptive, enhanced prison term of ten years. We affirmed his conviction and sentence on appeal. *State v. Ramos*, No. 2 CA-CR 2006-0245 (memorandum decision filed Jan. 29, 2008). Ramos then filed a notice of post-conviction relief, followed by a petition in which he asserted trial counsel had been ineffective when counsel had asked a law enforcement officer a question during cross-examination that prompted the officer to state Ramos had “refused to answer questions.” Ramos asserted the officer’s response violated the trial court’s ruling on Ramos’s previous motion to suppress evidence and called attention inappropriately to Ramos’s invocation of his right to remain silent. *See State v. Gilfillan*, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000) (defendant’s due process rights violated when witness testified defendant invoked right to remain silent).

¶3 After an evidentiary hearing, the trial court denied Ramos’s petition, finding the claim “precluded” by our previous memorandum decision. It did so because, in rejecting Ramos’s argument on appeal that the court had erred in denying Ramos’s motion for a mistrial based on the officer’s statement, we had concluded the statement could not have influenced the jury in rendering its verdict. The trial court went on to say

that, even if Ramos's claim was not "precluded" by this court's memorandum decision, Ramos was not prejudiced because the statement did not affect the trial's outcome.

¶4 Ramos argues in his petition for review that the trial court erred in concluding it was bound by our previous decision and in finding he was not prejudiced by counsel's questioning of the witness and elicited response. To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient showing on either part of the *Strickland* test, we need not determine whether the other part was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶5 As noted above, on appeal we rejected Ramos's argument that the trial court had erred in denying his motion for a mistrial. We first noted the statement was "invited by Ramos's counsel who repeatedly asked the [officer] about his questioning of Ramos," and referred to the invited error doctrine. *Ramos*, No. 2 CA-CR 2006-0245, ¶ 16; *see State v. Burton*, 144 Ariz. 248, 252, 697 P.2d 331, 335 (1985) ("Appellant may not invite error at trial and then assign the same as error on appeal."). We further observed the court had ordered the officer's statement stricken immediately, and that "[w]e therefore presume[d] that the jury did not consider it in reaching its verdict." *Ramos*, No. 2 CA-CR 2006-0245, ¶ 16. Relying on *Gilfillan*, we concluded the officer's

statement “could not have influenced the verdict.” *Id.*; see *Gilfillan*, 196 Ariz. 396, ¶ 38, 998 P.2d at 1079 (reference to defendant’s exercise of right against self-incrimination not error if “[t]here was no reasonable probability that the evidence materially affected the outcome of the trial”).

¶6 In denying Ramos’s petition for post-conviction relief, the trial court correctly concluded it was bound by that determination. See *Dancing Sunshines Lounge v. Indus. Comm’n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986) (explaining “the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate courts, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested”); *State v. Waldrip*, 111 Ariz. 516, 518, 533 P.2d 1151, 1153 (1975) (“Ordinarily, a decision of an appeals court in a prior appeal of the same case settles the law for an appellate court in a subsequent appeal.”). Although we referred in our previous decision to the invited error doctrine, our disposition of Ramos’s claim ultimately rested on our conclusion the officer’s statement could not have influenced the verdict. This conclusion forecloses Ramos’s ineffective assistance of counsel claim because he cannot demonstrate he was prejudiced by his counsel’s conduct. See *Salazar*, 146 Ariz. at 541, 707 P.2d at 945.

¶7 Ramos cites no authority, and we find none, suggesting our evaluation of the officer’s testimony should differ because Ramos now raises this issue in the context of an ineffective assistance of counsel claim. Instead, he contends we misapplied *Gilfillan* in our previous decision. This collateral attack on our decision is not cognizable

under Rule 32. The proper means of challenging our memorandum decision was a petition for review to the supreme court. *See* Ariz. R. Crim. P. 31.19. We will not reconsider the propriety of our previous decision in this post-conviction proceeding.

¶8 We grant Ramos's petition for review. For the reasons stated, we conclude the trial court did not abuse its discretion in denying Ramos's petition for post-conviction relief and we deny relief.

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Judge